

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALAN L. AVIS

Claimant

VS.

SPIVEY OIL FIELD SERVICES LLC

Respondent

AND

AMERICAN INSURANCE CO.

Insurance Carrier

Docket No. 1,047,822

ORDER

STATEMENT OF THE CASE

Claimant requested review of the May 25, 2010, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. Vincent A. Burnett, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) denied claimant's request for a change of physician. The ALJ further found that claimant's complaints regarding his right hand and elbow are not causally related to his work injury.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 20, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant contends the ALJ erred in denying his request for additional medical treatment and for a change of physician. Further, claimant argues the ALJ erred in finding his complaints regarding his right hand and elbow are not causally related to his work injury. Claimant asserts that his right elbow condition was caused by a series of accidents that predated his shoulder injury of January 9, 2009, and that his right wrist was injured

during physical therapy treatments after having surgery on his right shoulder as a result of a work-related injury.

Respondent argues that the Board lacks jurisdiction to review whether a claimant is entitled to medical benefits and asks that the Board dismiss claimant's appeal. In the event the Board finds it has jurisdiction in this appeal, respondent asks that the Board affirm the ALJ's Order, arguing there is no medical evidence indicating a problem with claimant's right elbow and there is no medical evidence that claimant injured his right wrist in physical therapy.

The issues for the Board's review are:

- (1) Does the Board have jurisdiction over the issues in this appeal?
- (2) If so, did the ALJ err in denying claimant's request for a change of physician?
- (3) Did the ALJ err in finding claimant's right elbow complaints and right wrist complaints were not causally related to his work injury?

FINDINGS OF FACT

Claimant began working for respondent in September 2007 as a winch truck operator. On January 9, 2009, he had an engine hanging on a cable. In an effort to set the motor on the base and align the bolt holes, he grabbed the engine and pulled. In doing so, he felt his right shoulder pop. Claimant had arthroscopic surgery in April 2009 and manipulation of his right shoulder under anesthesia in June 2009. He continues to have pain in his right shoulder.

Claimant testified that for a period of about a year and a half before the incident on January 9, 2009, he had been having problems with his right elbow. He had been wearing braces on his elbow 24 hours a day. Claimant said that he was talking with Alan Worden from respondent's workers compensation insurance carrier on the telephone sometime in January 2009 after the shoulder incident. He and Mr. Worden were discussing his right shoulder problem, and claimant told Mr. Worden that he was also having problems with his right elbow. Mr. Worden told claimant to be sure his employer knew about the elbow problems and said he wanted to try to get treatment for both conditions at the same time.¹ Claimant said he talked to Peggy Kaufman about his elbow that same day. Ms. Kaufman is respondent's secretary/bookkeeper. Claimant testified that he had also spoken with his boss, Randy Novak, and told him he was wearing a splint for his right elbow and that his problem was from pulling tubing. Claimant said some days he would switch loads so the other winch driver would take the tubing. Claimant testified that Mr. Novak did not have

¹ P.H. Trans. at 12-13.

a problem with his switching loads but did not suggest turning in the elbow condition to get any treatment. Most of these conversations were held after the shoulder injury.

Claimant testified he believed he developed his right elbow condition from times he unloaded tubing and casing off the trailer. He described them as 40-foot joints of steel pipe, and he was always at the back of the trailer. He was required to lift up, pull, and roll the pipe down. Respondent authorized Dr. John Babb to treat claimant's right shoulder injury. However, claimant was unable to get respondent to approve any medical treatment for his right elbow. Claimant has pain in the joint of his right elbow.

Claimant's shoulder injury was treated conservatively for several months after the accident. But on April 21, 2009, claimant underwent arthroscopic surgery on his right shoulder to repair a rotator cuff tear. Claimant said that about a week after the surgery, he was in physical therapy when he felt a pop on the top of his right wrist. He said he screamed in pain when it occurred. Initially he felt a lot of pain, but now the area is numb and he has trouble gripping things.

Claimant testified that he reported his elbow and wrist complaints to Dr. Babb. He said that Dr. Babb told him he could not treat the elbow unless it was approved by respondent. Claimant also said that Dr. Babb told him that the wrist, which popped during claimant's physical therapy, would have nothing to do with the shoulder operation. A review of the physical therapy records indicate that claimant complained of right elbow and wrist pain on several occasions.

On October 9, 2009, claimant filed an Application for Hearing with the Division of Workers Compensation alleging an accident on "9-1-07 and/or each working day thereafter thru 1-9-09." The cause of his accident was described as "repetitive trauma and pulling engine." He claimed injuries to his "right shoulder, arm, wrist, elbow and all affected parts."²

During the pendency of this workers compensation claim, claimant moved from Kansas to Nebraska. He said he had help moving, he packed the boxes lighter, and he stayed within the restrictions given by Dr. Babb. On July 3, 2009, claimant complained to his therapist that his muscles were sore in both arms because of the lifting and moving of his furniture in preparation for moving.

Claimant was seen by Dr. Pedro Murati on November 16, 2009, at the request of his attorney. Claimant gave Dr. Murati a history of his January 2009 accident and his medical treatment for his right shoulder. He complained to Dr. Murati of numbness in his right wrist, pain and loss of motion in his right shoulder, and right elbow pain. After reviewing claimant's medical records and completing a physical examination, Dr. Murati

² K-WC E-1, Application for Hearing, filed October 9, 2009.

diagnosed claimant with right carpal tunnel syndrome referring pain to the shoulder, right shoulder pain S/P distal clavicle excision and subacromial decompression at maximum medical improvement, and right anconeus sprain. Dr. Murati opined: "This claimant's current diagnoses are within all reasonable medical probability, a direct result from the work-related injury that occurred on 09-01-07 and/or every working day thereafter thru 01-09-09, during his employment with [respondent]."³

The ALJ ordered that claimant be seen for an independent medical examination by Dr. Terrence Pratt. Claimant was seen on March 19, 2010. In the history claimant provided to Dr. Pratt, he described the right shoulder injury of January 9, 2009. He also told Dr. Pratt that for about a year before the shoulder injury, he had been suffering from pain in his right elbow which he related to repetitive activities. He also told Dr. Pratt that during physical therapy after his right shoulder surgery, he heard a pop in his right wrist. Thereafter, claimant complained of numbness with diminished grip strength in his right hand.

After reviewing medical records and performing an examination, Dr. Pratt opined that as relates to claimant's right shoulder, claimant is at maximum medical improvement. He diagnosed claimant with possible peripheral nerve entrapment of the right wrist and recommended claimant have electrodiagnostic testing of the right upper extremity. However, Dr. Pratt could not relate the possible peripheral nerve entrapment to claimant's work-related accident in January 2009. Dr. Pratt also could not relate claimant's right elbow complaints, which he diagnosed as chronic right elbow discomfort, to the work-related accident in January 2009. He did not say whether those conditions were related to claimant's work from a series of traumas.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-510h states:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

(b) (1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may

³ P.H. Trans., Resp. Ex. 1, Dr. Murati's report of 11-16-09 at 3.

authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2009 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,⁴ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

⁴*Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁵

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁶ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁷

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁸

⁵See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁶ K.S.A. 2009 Supp. 44-501(a).

⁷ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁸ *Id.* at 278.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁰

ANALYSIS

An ALJ has the authority to grant or deny medical treatment at a preliminary hearing. The Board does not have jurisdiction to review those findings. The Board does have jurisdiction to decide the cause of claimant's injuries because that determination requires a finding of whether claimant has met his burden to prove he suffered personal injury by accident or a series of accidents that arose out of and in the course of his employment with respondent.

The ALJ denied claimant's request for additional medical treatment because "Dr. Pratt opined that claimant has achieved maximum medical improvement regarding his right shoulder injury. Dr. Pratt further opined that claimant's complaints regarding right hand and right elbow are not causally related to the work injury."¹¹ Dr. Pratt did opine that claimant was at maximum medical improvement with respect to his shoulder injury that occurred on January 9, 2009. Dr. Pratt also opined that he could not relate claimant's right elbow and hand complaints to the accident of January 9, 2009. Dr. Pratt did not, however, express any opinion as to whether claimant's elbow and hand symptoms were causally related to claimant's work activities with respondent as a result of a series of traumas. Neither did Dr. Babb. The only expert medical causation opinion on that issue was expressed by Dr. Murati. Dr. Murati relates those conditions to claimant's work. There is no contrary opinion. In addition, claimant relates his elbow symptoms to his work. He relates his hand symptoms to the physical therapy he received following his shoulder surgery.

Claimant has not received treatment for his elbow, wrist and hand complaints because Dr. Babb did not think they were related to the shoulder injury. Dr. Murati recommended claimant receive additional medical treatment, including bilateral upper extremity NCS/EMG testing. Dr. Pratt agreed with this recommendation for electrodiagnostic testing of the right upper extremity for peripheral nerve entrapment.

⁹ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹⁰ K.S.A. 2009 Supp. 44-555c(k).

¹¹ ALJ Order (May 25, 2010).

This Board Member concludes, based on the record presented to date, that claimant has met his burden of proving that his right hand, wrist and elbow injuries arose out of and in the course of his employment with respondent.

CONCLUSION

(1) & (2) On an appeal from an ALJ's preliminary order, the Board is without jurisdiction to review a denial of claimant's request for additional medical treatment and motion for a change of physician. The Board does have jurisdiction to determine whether an injury is causally related to work.

(3) Claimant has met his burden of proving that his right hand, wrist and elbow injuries arose out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 25, 2010, is reversed and remanded to the ALJ for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of August, 2010.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge